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ABSTRACT

The sharp increase in the number of cases that involve school antidrug policies continued in 1987. Courts continued to support school policies that contain an automatic suspension or expulsion penalty for school drug possession. First Amendment religious cases also continued to increase in number. A new grouping of cases under the heading "home instruction" contains cases raising a medley of First Amendment and other issues. The issue of substantive due process violations in corporal punishment cases was heard in two cases. Cases are discussed under the following sections: (1) public school assignment, tuition, transportation, home instruction, and compulsory attendance; (2) bilingual and bicultural programs; (3) private and parochial schools; (4) substantive rights of students, including search and seizure, and First Amendment religious and freedom of expression rights; (5) sanctions for student misconduct including suspensions, expulsions, and corporal punishment; and (6) desegregation, including systemwide and cross-district remedies, and desegregation plan oversight. (MLF)

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PUPILS

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INTRODUCTION

The sharp increase in the number of cases that involve school antidrug policies, seen in the "Pupils" chapter last year, continued in 1987. These cases are reported in both the search and seizure and the suspension and expulsion sections. Courts continued to support school policies that contain an automatic suspension or expulsion penalty for school drug possession.

First amendment religion cases also continued to increase in number, with the United States Supreme Court ruling that there was no secular purpose in a state statute that required "balanced" treatment of creation science when evolution was taught. Other religion cases addressed secular

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humanism, graduation ceremony invocations, and the right of students to "opt out" of portions of a school's reading curriculum. A new grouping of cases in this year's chapter under the heading "home instruction" contains cases raising a medley of first amendment and other constitutional issues. The right of parents to educate their children at home remains a fertile ground for litigation.

Several corporal punishment cases, with what courts characterized as brutal treatment of students, were heard in 1987. The long-dormant issue of substantive due process violations in corporal punishment cases was heard in two cases by circuit courts of appeal.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

State statutes that determine the residence of public school children and the charging of tuition to nonresidents were challenged in several 1987 assignment cases. The equal protection clause was used successfully by plaintiffs in two cases. In the first, a Texas district court held that children living with their grandmothers were residents of the grandmothers' school district for educational purposes.[1] The children resided in the Livingston Independent School District, which argued that it had no obligation to educate them because the grandmothers had never filed for legal guardianship status. The district court disagreed, finding that the children had been under the "lawful control" of their grandmothers for several years and that their residence was not undertaken for the primary purpose of attending school. As applied to children in such cases, the court held that the insistence that there be a formal guardianship proceeding violated the children's equal protection rights.

A Pennsylvania statute that sought to differentiate between nonresident children also fell to an equal protection challenge. The case involved children removed from their parental homes by court order who were placed with foster parents. The foster parents received state compensation for providing the child care. The challenged statute required local districts to provide free education to children in institutions and to those in uncompensated foster arrangements, but not to children where the foster parents were compensated.[2] The district court sought to find an important government interest in requiring the payment for children in the third category, but could find none. The section of the statute containing the provision was therefore found to violate the equal protection clause.[3]

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1. Byrd v. Livingston Indep. School Dist., 674 F. Supp. 225 (E.D. Tex. 1987).
2. 24 Pa. Stat. Ann. § 13-1305(b) (1970).
3. Nancy M. v. Scanlon, 666 F. Supp. 723 (E.D. Pa. 1987).

A New York district court considered the case of a mother and daughter who had been assigned by a social service agency to temporary housing in Yonkers, having spent one night in Mount Vernon, New York.[4] The public school systems in the two municipalities each held that the other was responsible for the child's education. The case was made more complicated by the fact that the mother's attorney sought relief in federal court without following the state's residency determination administrative appeal procedures. At no time, however, had the mother been told of the administrative appeals process. A variety of legal challenges to state statutes and against the state commissioner of education were filed, but the court declined to rule on these, confining its ruling to the issuance of a preliminary injunction requiring Yonkers to educate the child as long as the child's residency continued in that district. The court also expressed its hope that the state would be able to address the question of school residence for homeless children before it was necessary to enter a final ruling in the case.

In a case that also raised questions about social services placements and tuition, a New York appeals court held that a social service residential placement did not require the receiving district to educate the child.[5] The court ruled that the district where the child had resided for a number of years was obligated to pay tuition for the child, even after the state assumed custody.

Two companion cases addressing the power of the state superintendent to order tuition transfers were heard by the Supreme Court of Montana.[6] The parties contested whether the local school board had ignored the criteria enumerated in state statutes for deciding tuition requests and questioned the appropriate latitude granted to the county and state superintendents in reviewing local board decisions. In a split decision, the Montana high court held that the state superintendent could not go beyond the printed record in reviewing the case, even though the local board had ignored several statutory criteria it was to consider in such cases. In addition, a lower court that looked at the county superintendent's decision was found to be correct when it held that the decision could be overturned only if it was "clearly erroneous," based on the criteria considered. In dissent, two justices of the high court argued that the state superintendent was right in considering all the criteria in making his decision.

A city school district and a county district in which the city was

4. Orozco v. Sobol, 674 F. Supp. 125 (S.D.N.Y. 1987).

5. Board of Educ., Commack v. Port Jefferson Union Free School Dist., 520 N.Y.S.2d 793 (App. Div. 1987).

6. Frazer School Dist. No. 2 v. Flynn, 732 P.2d 409 (Mont. 1987); Frazier [sic] School Dist. No. 2 v. Forsness, 734 P.2d 1218 (Mont. 1987).

located filed suit, each seeking to educate students who lived in a part of the county that had been annexed to the city.[7] The Alabama city argued that state law required the students to attend their schools, but the appeals court affirmed a lower court ruling that state statutes contained no such requirement. The appeals court did find a provision that permitted the collection of fees from elementary students attending a public school outside their district, which the court read as permitting students a choice in attendance. On a motion for rehearing, the court refused to address the qeustion of transportation fees, since it had not been raised in the original suit.

An unincorporated parents' group in Jackson County, Florida, challenged the transfer of all students in grades seven and eight who were attending a K-8 elementary school to a K-12 school in the district.[8] The appeals court upheld a lower court decision that the school board's decision was not an abuse of its discretion to act on pupil assignments.

Transportation

North Dakota's statutes permit nonreorganized school districts to levy a school bus service charge to help support the cost of transporting students to school. Two parents protested the $97-per-child annual fee assessed by the Dickinson School District, claiming that the fee violated article VIII, section 2 of the North Dakota Constitution, which calls for a "free" public education. In addition, the plaintiffs argued that their equal protection rights had been violated because state law provided that all reorganized districts had to provide free transportation. It was not claimed that the parents were unable to afford the fee; in fact, as an alternative to paying the bus fee, the parents transported the children by car at an admittedly greater cost than the bus charge.

A lower court ruled in favor of the school district and, by an even vote, the North Dakota Supreme Court upheld the lower court decision.[9] Both affirming and dissenting justices agreed that transportation was not included in the state constitutional provision for a "free" education. There was, in fact, a long-standing legislative practice of asking parents to pay part of the transportation costs. There was a split, however, on the question of the equal protection claim. The justices affirming the lower court used a rational relationship test, finding that the use of the charge only in unreorganized districts served the state's interest in urging school district reorganization. The dissenting justices, on the

7. Phenix City Bd. of Educ. v. Teague, 515 So. 2d 971 (Ala. Civ. App. 1987).
8. SOS Alford v. School Bd. of Jackson County, 511 So. 2d 439 (Fla. Dist. Ct. App. 1987).
9. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987).

other hand, used the greater "intermediate level of review" in assessing the equal protection claim, observing that some children, if not the plaintiffs, might be cut off from a public education by the charge. The school district did not waive the fee for low-income parents, causing the dissenting justices to conclude that the fee violated the state's equal protection clause. Nevertheless, on an even vote, the entire lower court decision was upheld and the fee for transportation was allowed to continue.

Home Instruction

Challenges to compulsory attendance laws by members of fundamentalist religious sects continued unabated in 1987. Parents wishing to educate their children at home or in small, unaccredited private schools continued to raise a variety of issues that can be grouped in three categories. First, it was argued that the first amendment afforded protection from state requirements that home instruction parents or unaccredited schools report on the attendance of students or on the curriculum being used. Second, plaintiffs advanced the claim that the Supreme Court's decision in *Wisconsin v. Yoder*[10] provided protection from state attendance requirements, arguing that their sect was like the Amish in *Yoder* and that the equal protection clause therefore required approval of their program. Finally, plaintiffs challenged state requirements that the home instruction or small academy curriculum be "essentially equivalent" to that afforded in the public schools, on the grounds that this requirement was overly vague. In recent years, plaintiffs in these cases have succeeded most often with the third line of attack. In 1987 cases, courts found none of the three arguments to be persuasive.

All three claims were advanced in an Iowa case that was heard by the Eighth Circuit Court of Appeals. Litigants contesting Iowa's compulsory attendance and home instruction laws have been active in both state and federal courts over the past decade. Iowa's law in this area is more restrictive than most, requiring that private schools report annually the names of students and teachers and the curriculum being used. The law also requires equivalent instruction by certified teachers through grade eight. In 1985, a district court upheld the statutes, but found that "equivalent" instruction, undefined by the statute, was overly vague.[11]

Both parties appealed and the Eighth Circuit Court affirmed in part and reversed in part.[12] The plaintiffs in the current case claimed that the

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10. 406 U.S. 205 (1972).

11. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985). *See* The Yearbook of School Law 1986 at 76-7.

12. Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987).

state reporting requirements violated their belief in the "Headship of Christ" and in the separation of church and state. While they were willing to have parents report data, they were unwilling to have schools make the reports. The appeals court upheld the lower court ruling in favor of the requirement, finding that the burden on the plaintiff's religious rights was very minimal, if in fact it was present at all.

The certification requirement also was upheld. The court observed that while the plaintiffs claimed that the license requirement interfered with "God's calling to teach," the plaintiffs did not object to state licensing for other occupational calls, such as those heard by doctors and lawyers. Claims that the licensing requirement violated the plaintiff's free exercise rights or that they were entitled to a "*Yoder* exemption" also were rejected. The court noted that the church was fully integrated into the larger society, with some members sending their children to local public schools.

The appeals court remanded two portions of the lower court decision. Noting that the state had promulgated equivalent instruction standards in 1986, the court remanded the claim that "equivalent instruction" was overly vague back to the district court to be reconsidered in light of the new rules. The lower court also had denied attorney's fees for the Keokuk school district, holding that Keokuk was the prevailing party in the case but that the plaintiffs' case was not so frivolous as to require the plaintiffs to pay the fees. The appeals court reversed, finding that the plaintiffs "were aware that the arguments they presented to the district court did not present any issue of first impression, but in fact had been rejected by numerous courts."[13] The court found that the school was included as a defendant in the case only because the district continued to report children to the county attorney who were attending the plaintiffs' school.

Massachusetts law requires that home instruction programs be "equal in thoroughness and efficiency, and in the progress made therein" to programs offered in the public schools. Home instruction parents are required to submit the curriculum materials used and the qualifications of instructors to local school administrators for approval and to use standardized tests to ensure that children are learning at home. A federal court had ruled in 1984 that the home instruction statute was not overly broad[14] and similar issues were before the Massachusetts Supreme Judicial Court in 1987.[15] The plaintiffs in the case wished to educate their three children at home and, after meetings with the school committee

13. *Id.* at 499.

14. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1984). *See* The Yearbook of School Law 1986 at 78.

15. *In re* Charles, 504 N.E.2d 592 (Mass. 1987).

and administrators, declined to supply the required information.

While the parents raised a variety of challenges, the court held that the state's standards for reviewing private schools, plus accumulated case law, provided the criteria for review. The plaintiff's loss of first amendment religious rights and fourteenth amendment liberty interests were seen as less significant than the state's interest in ensuring that each child receives an education. The court went on to detail the rights of parents in presenting their school plans to school committees, including the right to a hearing and the right to modify their plans based on the hearing. While the requirements, including review and testing to measure student progress, were upheld, the high court remanded the case to a lower court to give the parties a chance to resolve their dispute under the guidelines offered in the decision.

A Massachusetts district court considered the issue of the extent to which local school administrators could monitor the teaching and programs in private religious schools to ascertain compliance with that state's "equal in thoroughness and efficiency" requirement. The law gives public school committees the obligation to approve the private schools operating within their boundaries. The New Life Baptist Church Academy, a small, newly formed fundamentalist school, challenged the East Longmeadow school committee's review, raising a variety of first and fourteenth amendment issues. Since the district court had ruled previously that the Massachusetts statute was not vague, nor was the process a denial of the rights of religious schools to operate,[16] the current court opinion focused on the methods that East Longmeadow was employing to review the academy's programs.[17]

The committee had requested information on the curriculum, on the school hours and the days the school was in session, on health and safety conditions at the school, and on the qualifications of the faculty. Public school officials insisted that teachers at the academy should have college degrees and that it would be necessary for them to observe academy classes being taught. Though the academy had made a number of changes as the result of conversations with school officials, such as changing the length of the academy school year, and had expressed a willingness to comply with all safety inspections, they claimed that it would be sinful for them to subordinate "God's judgment" on curriculum to that of the state. They agreed to teach the state-required subjects but would not allow visits to monitor compliance.

The district court concluded that it was not necessary for sincerely

16. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1984).

17. New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987).

held religious views to be consistent, citing *Thomas v. Review Board*,[18] holding that the plaintiffs' religious rights could be violated by some forms of state control, even though they did not object to other regulation. The court then used the three-part test in *Lemon v. Kurtzman*,[19] concluding that the methods employed by school officials to monitor the curriculum of the academy violated the establishment clause. The third of the *Lemon* tests, excessive government entanglement, was implicated, the court reasoned, because public school officials would have to spend significant time on the premises of the academy to monitor compliance. Two recent Supreme Court decisions were advanced to support this interpretation.[20]

The district court held that there were less restrictive ways to ensure that the state's valid interest in securing compliance with the statute could be met. The court held that the use of standardized tests to monitor progress would not involve entanglement.[21] The court also approved the concept of a follow-up involvement by public school officials when a student's test scores indicated problems. The details of how this might work were left to be worked out between the parties. Having used establishment clause analysis to substantiate its remedy, the court also was left with the conclusion that the establishment clause was no bar to requiring teaching credentials for private school instructors.[22] Rather than reaching a conclusion on this point, however, the court left this matter as an issue to be discussed by the parties.

This case is unusual, particularly in its development of a "least restrictive" regulatory approach for home instruction or private school analysis. The Massachusetts statute regulating private schools, however, contains powers for public school officials not found in most states. The academy in question also was willing to comply with more regulations than customarily is the case in similar litigation, leaving only the lengthy site monitoring as the central issue.

Ohio plaintiffs also argued that the state had less restrictive ways to ensure that children in home instruction programs were being educated than to seek prior program approval from local school superintendents.[23] Unlike the Massachusetts case just discussed, the Ohio Supreme Court

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18. 450 U.S. 707 (1981).
19. 403 U.S. 602 (1971).
20. Aguilar v. Felton, 473 U.S. 402 (1985) (on-site inspection of public school instruction and clinical guidance services in private schools to assure that teachers are providing secular education creates entanglement); Meek v. Pittinger, 421 U.S. 349 (1975) (surveillance of remedial and accelerated instruction and guidance, counseling, and testing in private schools by public school employees creates entanglement).
21. *See* Wolman v. Walter, 433 U.S. 229 (1977).
22. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).
23. State v. Schmidt, 505 N.E.2d 627 (Ohio 1987).

refused to find a constitutional violation. The plaintiffs had refused to submit their program for review and the court majority declined to decide prospectively whether the local superintendent would act arbitrarily. While two dissenting justices held that the lack of standards in the statutes constituted grounds for not complying with them, the majority maintained that there were adequate appeal processes within the statutes to address these issues and that the statutes did not infringe on the plaintiff's free exercise rights.

A Texas appeals court heard claims by home instruction parents who argued that they were exempt from compulsory attendance laws under the first and fourteenth amendments, the Texas Constitution, and "the word of God."[24] The parents argued their case without legal counsel, however, making it difficult for the court to determine how their free exercise rights were burdened by the compulsory attendance law. The court held that the first amendment prohibited it from deciding the ecclesiastical issue raised by the plaintiffs and found that they had failed to show that the lower court had made any reversible error.

Compulsory Attendance

In a compulsory attendance challenge heard by the Iowa Supreme Court, a couple seeking to educate their children at home raised a variety of constitutional challenges to the state's compulsory attendance laws. The state's supreme court, however, declined to hear the constitutional issues, holding instead that no crime had yet been committed because the statute requires children to attend school or be taught by a certified teacher for at least 120 days each year.[25] Since there were more than 120 days left in the school year, the court reasoned that the parents had yet to violate the law. This approach was sharply attacked by dissenting justices, who held that it "completely gutted" the compulsory attendance law. Waiting until a child had fewer than 120 days left in the school year before commencing prosecution has the effect of preventing the child's promotion to the next grade, because that number is the minimum number required.

A Maryland appeals court heard an appeal in a more traditional compulsory attendance case involving two mothers whose children missed between 70 and 86.5 days in the school year for a variety of reasons that a lower court had characterized as "insubstantial." They had been fined and given a suspended sentence by the court. On appeal, the plaintiffs used what the appeals court characterized as a "scatter gun" to raise a host of issues.[26] Several of them were related to fine

24. Howell v. State, 723 S.W.2d 755 (Tex. Ct. App. 1987).
25. State v. Trucke, 410 N.W.2d 242 (Iowa 1987).
26. *In re* Jeannette L., 523 A.2d 1048 (Md. Ct. Spec. App. 1987).

points about truancy determinations made by school officials that were irrelevant to the case at hand. Two issues, however, were of particular interest in the appeals court decision. The lower court had granted the plaintiffs' request for a jury trial, even though state statute clearly called for hearings in juvenile matters to be conducted without juries. On appeal, the plaintiffs challenged the granting of their own request, which the appeals court held could not be challenged since it was granted on their motion.

The case was remanded to consider the question of a proper penalty for the violation. The trial court had assigned a fine and a suspended sentence for each day of the alleged violation. To the appeals court, however, a clear reading of the statute permitted a fine for each day but a maximum ten-day sentence for the accumulated offenses.

A New York City juvenile who was detained by a police officer for being truant was convicted in a juvenile proceeding of assaulting the officer. In 1986, a New York appeals court held that police officers, in addition to attendance officers employed by the schools, had the power to enforce compulsory attendance laws.[27] The case was appealed to the Court of Appeals of New York. In affirming the lower court, the New York high court ruled that the failure of state statutes to specify that regular police officers could enforce truancy laws did not mean that they could not do so, since other provisions gave police the power to enforce all laws and ordinances in New York City.[28]

BILINGUAL AND BICULTURAL PROGRAMS

Four Louisiana parishes received federal funds under the Bilingual Education Act[29] for the fiscal years 1979-81, totaling between $477,000 and $765,000 for each parish. Each parish has a unique history and a significant population of non-English-speaking residents, two with concentrations of French-dialect speakers, one with a large number of Spanish-speaking residents, and a third with a large population speaking Italian. The United States Department of Education had made the bilingual education grants in 1979 and had conducted on-site reviews and annual evaluations, in each case praising the programs in the four parishes.

In 1981, the department responded to letters alleging misuse of the bilingual program funds by conducting a criminal investigation, visiting the school districts, and interviewing school officials. The investigators concluded in 1982 that the program had used federal funds to provide

27. *In re* Shannon B., 503 N.Y.S.2d 179 (App. Div. 1986).
28. *In re* Shannon B., 517 N.E.2d 203 (N.Y. 1987).
29. 20 U.S.C. §§ 3221-3262.

ineligible programs, primarily foreign-language instruction, and that ineligible students were participating in the programs. Only one of the four programs, however, had received a program audit, wherein it was discovered that fewer than the required 60% of the students in the program came from predominantly non-English-speaking homes. An internal appeal process within the department affirmed the findings, and the four parishes were ordered to return all the federal funds each had received since the program's inception.

Three of the school boards appealed to the Fifth Circuit Court of Appeals, claiming that they could not be compelled to return funds without a program audit.[30] St. Charles Parish, the district that had received an audit, raised a number of methodological challenges to it. All four districts claimed that the repayment could be required only for the portions of the programs that were inconsistent with federal regulations. In response, the department admitted that it had never before demanded repayment without a full program audit, but claimed that the criminal investigation sufficed.

The court of appeals agreed that audits were necessary before the repayment could be demanded and held that the repayment could be requested only in an amount to cover the expenditure for ineligible recipients. The court observed that it was the current students in the districts who would suffer from any repayment and cautioned the department to consider the fact that there had been no allegation of bad faith on the part of the school officials and no charge that the programs had been unsuccessful.

A class action suit filed on behalf of Spanish-speaking children enrolled in Illinois schools was heard by a district court in 1985.[31] The plaintiffs charged that the state had violated the Equal Educational Opportunities Act of 1974[32] by failing to develop guidelines for local school districts to use in identifying, placing, and training children for whom English was a second language. Local districts were left to develop their own methods for identifying bilingual education participants, with widely varying results. The district court, without addressing the substance of the complaint, granted a summary judgment in favor of the state defendants, finding that the plaintiffs had failed to assert a claim upon which relief could be granted. The court held that the state enjoyed eleventh amendment immunity, citing the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*.[33]

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30. Tangipahoa Parish School Bd. v. United States Dep't of Educ., 821 F.2d 1022 (5th Cir. 1987).

31. Gomez v. Illinois Bd. of Educ., 614 F. Supp. 342 (N.D. Ill. 1985). *See* The Yearbook of School Law 1986 at 82.

32. 20 U.S.C. § 1703 (f).

33. 465 U.S. 89 (1984).

The Seventh Circuit Court of Appeals concluded that the district court had misread *Pennhurst*.[34] *Pennhurst* would apply if the plaintiffs were seeking to vindicate rights under state law, which is the way the lower court saw the case. The appeals court, however, saw the litigation as arguing that the state had not discharged duties imposed by federal law. In looking at the lower court's decision to dismiss, the appeals court also found that the lower court had failed to view the evidence in the light most favorable to the plaintiffs, as required by federal rules governing summary judgments. As to the standards the lower court should use in rehearing the case, the appeals court suggested the approach taken by the Fifth Circuit[35] that would require the court to review whether local programs were "reasonably calculated" to improve the education of bilingual children. Having found that the plaintiffs had stated a claim that must be reviewed in full lower court proceedings, the case was remanded.

California plaintiffs appealed a lower-court decision that failed to grant a preliminary injunction in a suit brought to stop state rules that determined the eligibility of students for bilingual programs. Finding that the only issue in the case, whether the new rule was in conflict with legislative intent and other statutory provisions, had been fully argued, the state appeals court decided to resolve the question.[36] The challenged rule permitted school districts to return students in a bilingual program to an English-only classroom if the students had been enrolled in the program at least three years, had received English reading instruction in an organized program during the past year, had been recommended for such placement by a language appraisal team, and would be provided with needed instructional support services. Each child's parent or guardian also had to consent to the new placement. A provision of the old rule, that plaintiffs wanted kept, contained an absolute requirement that the student also achieve a certain test score on an English proficiency test.

The plaintiffs argued that the statute, which called for an "objective comparison" of the child's progress, could be satisfied only by retaining the test score requirement. The state replied that the modified requirements for determining the placement would allow districts to consider the totality of a child's progress, and, with parental consent required, contained sufficient protection against arbitrary decisions by local school boards. The appeals court agreed, citing *Lau v. Nichols*[37] as ultimate authority for the proposition that states should seek the reentry of students from bilingual programs to English-only programs whenever

34. Gomez v. Illinois Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987).
35. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
36. Jimenez v. Honig, 233 Cal. Rptr. 817 (Ct. App. 1987).
37. 414 U.S. 563 (1974).

possible. The revised rules, the court held, still met the requirement of "objective assessment," as called for in the California Bilingual-Bicultural Education Act.

PRIVATE AND PAROCHIAL SCHOOLS

Private and parochial school cases are included with the home instruction cases in an earlier section if they involve alleged violations of compulsory attendance law. Private school cases reported in this section traditionally involved transportation, discipline, or tuition contract issues.

A Missouri appeals court in 1987 considered the appropriate tuition payment for a student who was expelled for fighting and for the student's brother, who left the school alleging that he had been harassed by other students.[38] A lower court had required the parents to make a partial payment of the annual tuition, based on the October date when the brothers left the school. The father, however, had signed a contract that contained a clause requiring payment of the full amount if a student was dismissed or withdrew. While the lower court had held that fighting was an insufficient cause for an expulsion, the appeals court reversed, observing that all students at the school had signed a "no-fighting pledge" at the start of the school year. The expulsion penalty was explicitly stated in the pledge. For the appeals court, then, the expulsion was justified, even though the parents were not notified until after it had occurred. The court also held that there was no refund owed for the brother who had been withdrawn voluntarily by the parents.

A New York Hasidic private school, the United Talmudic Academy, and parents of children attending the school, presented a complicated set of issues to a district court in a case that started when female bus drivers sued the public school district where they were employed.[39] The provisions of the bus drivers' contract required assignment of drivers based on seniority. The public school district provided transportation to the children enrolled in the academy under provisions of New York law requiring that transportation "shall be offered equally to all children in like circumstances residing in the district."[40]

When a male driver assigned to the academy bus runs retired, female drivers had the most seniority and were assigned by the school district to transport the students. Male academy students refused to board the buses, reflecting their religious belief that they should not be

38. Thomas Jefferson School, Inc. v. Kapros, 728 S.W.2d 315 (Mo. Ct. App. 1987).
39. Bollenbach v. Board of Educ. of Monroe-Woodbury, 659 F. Supp. 1450 (S.D.N.Y. 1987).
40. N.Y. Educ. Law § 3635 (1) (Supp. 1986).

exposed to members of the opposite sex. The complex dispute was presented to the court for summary judgment, with the female drivers arguing contract and sex discrimination issues and the academy and parents arguing free exercise and state law issues. Finding that no factual issues were in dispute, the court agreed to decide the case.

The central question from the court's perspective was whether the assignment of only male drivers would violate the establishment clause. The court used *Lemon v. Kurtzman*[41] in its analysis, finding that the second prong of the test used in that case would be violated by the policy. The policy, the court held, would have the "primary effect" of advancing the Hasidic tenet that boys must not come into contact with women. Using language drawn from *Grand Rapids School District v. Ball*,[42] the court concluded that the use of male-only drivers would represent an "impermissible symbolic union" between church and state. The loss of free exercise rights by the academy therefore was justified to prevent the establishment clause violation. The policy was also found to violate the rights of female drivers under title VII of the Civil Rights Act of 1964.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

School search and seizure cases rely heavily on the Supreme Court's decision in *New Jersey v. T.L.O.*[43] The decision established a "reasonableness" test for reviewing school searches, holding that school officials must have a reasonable suspicion that a student has violated the law or school rules. The methods used in the search have to be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[44] A number of 1987 school search cases challenged the efforts of school officials to enforce antidrug statutes or rules, arguing that penalties for violations should be set aside because of improper searches. As in recent years, plaintiffs generally were unsuccessful in advancing such claims.

The Eighth Circuit Court of Appeals considered a case that raised an issue not covered by *T.L.O.* (i.e., the grounds for a search that involved a police liaison officer).[45] The *T.L.O.* opinion contains numerous references to "school searches," causing the appeals court to conclude that special attention was required in looking at a search

41. 403 U.S. 602 (1971).
42. 473 U.S. 373 (1985).
43. 469 U.S. 325 (1985).
44. *Id.* at 336.
45. Cason v. Cook, 810 F.2d 188 (8th Cir. 1987).

involving nonschool personnel. The defendant police officer was assigned to the Des Moines high school as a permanent liaison and wore civilian clothes while working with school officials to maintain order. When several thefts from a gym locker room were reported within a brief period, students seen in the area were questioned. After questioning the students, a search of a student's purse revealed a change purse that had been taken from another student's locker. The liaison officer then conducted a pat-down search of the student found with the coin purse. The officer also was present at the questioning of the students by school officials and presented a card to the two students that ordered them to appear with their parents at a police station. Both students ultimately were suspended from school. A lawsuit then was initiated. A district court granted a directed verdict in favor of the school system, holding that the search was reasonable and that the participation of the officer did not change the search standard from reasonable suspicion to probable cause, as would be required for searches conducted by police officers in most circumstances.

The court of appeals affirmed the lower court, based in part on the fact that school officials were at all times in charge of the investigation. The search by the officer was conducted at their request and was not the product of an official police investigation. The appeals court also concluded that *T.L.O.* requirements had been met. There was strong suspicion that the students were involved in the theft, given their presence in the vicinity, and a pat-down search, given the nature of the offense, also was found to be reasonable. Since the students never were arrested, other claims advanced by the plaintiffs also were dismissed.

Six dollars missing from a classroom aquarium fund led to a search of two fifth-grade students and a lawsuit that reached the Supreme Court of Alabama.[46] The money disappeared from an envelope during a student recess, casting suspicion on two students who remained in the classroom with the envelope while the rest of the class was outside. Upon discovering that the money was gone, students working at the direction of the classroom teacher searched the two students' possessions and desks. A dispute over what occurred next remained unresolved, with one student insisting that she was forced to stand in front of the class and remove her shoes. The teacher, she claimed, then searched her socks for the money. It was never found.

A lower court upheld the validity of the search and the Alabama high court affirmed, holding that there was reasonable suspicion that one of the two students had taken the money. The court also held that the methods used were reasonably related to the purpose of the search.

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46. Wynn v. Board of Educ. of Vestavia Hills, 508 So. 2d 1170 (Ala. 1987).

In dissent, a single justice argued that the humiliation suffered by the child should lead to a finding that the search was excessively intrusive.

An Arizona appeals court considered a case in which a student was seen outside a school near bleachers in an area frequently visited by students who were skipping classes or seeking to avoid detection from other rule violations. The school monitor who observed the student asked the student to empty his pockets, in which was located a bag containing cocaine. The student was committed to the state corrections department following a holding that he was delinquent. A lawsuit followed, with the plaintiffs arguing that the search was unreasonable.

T.L.O. did not address the question of whether evidence taken in a search could be excluded from consideration in a juvenile proceeding where a search was found to be unreasonable. The Arizona court, without explicitly discussing the issue, held that the monitor had no reason to suspect that the student was engaged in wrongdoing and ordered the evidence suppressed.[47] Other than being in an area where misbehavior sometimes occurred, the student had evidenced no suspicious behavior and had no record of previous school rule infractions.

Two district court decisions addressing the drug and alcohol testing policy in the Arkadelphia, Arkansas schools were decided in 1985 and finally were published in 1987. The school district policy that gave rise to the lawsuit contained a number of provisions that were subjected to lengthy analysis by the court. Under the policy, students could be subjected to one or all of several tests, including blood, breath, urine, and polygraph testing. A trace of illegal drugs constituted a violation of school rules and for a first-offense violation the student was given a chance to withdraw for the remainder of the semester, with loss of grades. If the student refused to withdraw, he would be expelled for the semester.

Three students who were in a restroom where marijuana had been smoked testified that they were told they were required to take the test. All three were forced to provide urine samples that were given in the presence of a school official. One of the three tested positive and withdrew. In a second incident, a student recorded .06 on a breathalyzer test, administrated when school authorities smelled alcohol on his breath. He too withdrew, and a scuffle with the principal added a second semester of suspension to his penalty.

While the plaintiffs' arguments included a variety of procedural and factual disputes, of greatest interest is the court's discussion of the drug policy. In the case of the urinalysis, the court concluded that the students had "agreed" to take the tests only because they thought they had to and that such consent was neither free nor voluntary.[48] The test itself, the

47. *In re* Pima County Juvenile Action, 733 P.2d 316 (Ariz. Ct. App. 1987).
48. Anable v. Ford, 653 F. Supp. 22, 39 (W.D. Ark. 1985).

court decided, contained such a high level of false positives and false negatives that it was not reliable. In addition, positives could be related to nonschool consumption. On this point the court concluded, using *T.L.O.* language, that the test was not "reasonably related" to maintaining order in school.

For the plaintiff who had been drinking, the court found that the student and his mother had consented to the breathalyzer test and that its reliability was well established. The student's suspension therefore was upheld. The plaintiff subjected to the urinalysis was awarded one dollar for the due process violation and $500 as compensatory damages. Further use of the test was also enjoined.

In a subsequent opinion the district court considered the question of the retention of urinalysis results in student records and clarified its first opinion.[49] The court declared that the urinalysis testing violated the first and fourteenth amendments and that the use of test results also violated those amendments. No record of the tests could be maintained in student files. Observing that the defendants wished to continue urine testing, the court indicated that it felt that school officials had adequate notice after its second opinion that they did so "at their peril." After discussing the urine tests in light of several precedents,[50] the court held that the "seminude body fluid search" made the defendants both officially and individually liable for damages.

First Amendment Religious Rights

The curriculum of the public schools continued to be the object of first amendment battles in 1987. At issue were claims that "balanced" treatment of such subjects as evolution required the presentation of religious themes and responses and that the inclusion of religious perspectives violated the establishment clause. Plaintiffs also continued to argue that their religious freedom was violated by the inclusion of certain topics in the curriculum, or that certain books violated the establishment clause. It was argued that the books should be removed or that students should be permitted to skip classes where offensive materials were taught.

The United States Supreme Court heard a challenge to Louisiana's Balanced Treatment for Creation-Science and Evolution-Science Act. The Act required that the theory of evolution be paired with "creation

49. Anable v. Ford, 663 F. Supp. 149 (W.D. Ark. 1985).

50. Wood v. Strickland, 420 U.S. 308 (1975) (school officials may be liable for denying the constitutional rights of students); Schmerber v. California, 384 U.S. 757 (1966) (higher standards for searches of body cavities or of bodily fluids); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (liability for nude search of a student following sniff dog alert in random drug search).

science" whenever either was taught in the public schools. A district court had issued an injunction against the implementation of the Act, holding that it had no secular purpose, thereby failing the first *Lemon* test, and the court of appeals agreed.[51] Attempts to have the appeals decision reconsidered also failed[52] and the ruling that creation science advanced religious doctrine was before the Supreme Court.

Cases deciding that a state statute has no secular purpose are relatively rare,[53] requiring a court to find that a legislature acted to promote religion. The two other tests suggested by *Lemon*, that the law must neither advance nor inhibit religion and not lead to excessive government entanglement with religion, are more commonly the source of first amendment violations. In this case, however, the Supreme Court majority upheld the district court ruling that the law had no secular purpose.[54] In addition to the five-person majority opinion, Justices Powell and O'Connor filed a concurring opinion, Justice White concurred in the result and the Chief Justice and Justice Scalia dissented.

The Court majority looked at the legislative history of the Act and found that the purpose of its sponsor was to "narrow" the science curriculum. This violated the academic freedom of those who might decline to teach creation science. In addition, the Act gave "preference to those religious groups that have as one of their tenets the creation of humankind by a divine creator."[55] This was seen as advancing religion, rather than as furthering a secular purpose, such as making the science curriculum more effective. Justice Powell's concurring opinion expanded this argument, focusing on the origins of creation science, finding that the sources of creation science were institutions that were concerned that our nation had drifted too far from its belief in an "omnipotent Creator."

In dissent, Justice Scalia argued that the issue had never been fully heard by the district court and that state courts had not had a chance to interpret the statute. He also concluded, after a lengthy review of legislative history, that it was erroneous to conclude that legislators acted exclusively for religious purposes. Describing the determination of legislative intent as "a perilous enterprise," the dissentors ended with an attack on *Lemon* and its use in establishment clause cases.

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51. Aguillard v. Treen, 634 F. Supp. 426 (E.D. La. 1985), *aff'd sub nom.*, Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985). *See* The Yearbook of School Law 1986 at 99.

52. Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985).

53. Epperson v. Arkansas, 393 U.S. 97 (1968) (statute forbidding the teaching of evolution); Stone v. Graham, 449 U.S. 39 (1980) (statute requiring posting of Ten Commandments on classroom walls); Wallace v. Jaffree, 472 U.S. 38 (1985) (statute authorizing moment of silence for prayer).

54. Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

55. *Id.* at 2582.

In a case attracting wide attention, a Tennessee district court ruled in 1986 that parents could remove their children from elementary school reading classes when materials from the Holt, Rinehart, and Winston basic reading series were being employed.[56] The parents argued that the series espoused, among other things, "feminist, humorist, vegetarian, or one-world government views" that offended the teachings of their religion. The plaintiffs belonged to no organized sect but all considered themselves to be born-again Christians. In addition to allowing children to "opt out" of reading classes, the district court awarded the plaintiffs over $51,000 in damages.

The Sixth Circuit Court of Appeals reversed, concluding that "exposure" to diverse ideas does not constitute the teaching or promotion of a particular religious or philosophical perspective.[57] The appeals court found that the lower court had erroneously concluded that objecting parties were required to take some action that offended their religious beliefs. In the case at hand, the court found that no action was urged on the children. The court quoted Justice Jackson's concurring opinion in *McCollum v. Board of Education*, "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds."[58] The appeals court found no free exercise violation and reversed the awarding of damages. In two concurring opinions, one circuit judge argued that even if there had been a free exercise violation, there was a compelling state interest to justify it. The third judge went still further, arguing that school boards could establish any curriculum no matter how one-sided, so long as it did not violate the establishment clause.

The seemingly endless line of Alabama prayer cases, arising out of state laws, continued in 1987. In 1983 the district court adopted the position, later reversed, that the first amendment had never been incorporated by the fourteenth amendment to the actions of a state.[59] Following a series of appeals, the Supreme Court struck down a part of the Alabama law that called for "mediation or prayer" at the start of the school day,[60] but denied certiorari with regard to nonstatutory school prayer practices.[61] This left those issues to be argued in the district court. After a lengthy 1986 bench trial, the district court found that forty-four

56. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986). *See* The Yearbook of School Law 1987 at 91-2.

57. Mozert v. Hawkins County Pub. Schools, 827 F.2d 1058 (6th Cir. 1987).

58. 333 U.S. 203, 235 (1948).

59. Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part sub nom.*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

60. Wallace v. Jaffree, 472 U.S. 38 (1985).

61. Board of School Comm'rs of Mobile County v. Jaffree, 466 U.S. 926 (1984).

textbooks on the Alabama approved textbook list violated the establishment clause by unconstitutionally establishing the religion of secular humanism.[62] The texts, in the opinion of the court, failed to treat religion fully by not incorporating religious themes into the history, economics, and other texts that were removed by the court from the list.

On appeal, the Eleventh Circuit Court of Appeals again reversed the district court.[63] The appeals court found that the textbooks conveyed no message of endorsement of secular humanism or any religion. Citing *McCollum*, the appeals court concluded that neutrality on religious matters could not be equated with hostility toward religion. There is nothing that prevents Alabama teachers from including religious themes in classes, the court reasoned, and no reason to violate the establishment clause by requiring them to speak about the subject. The appeals court ordered the district court to terminate the litigation.

Prayers offered at school commencement ceremonies are the subject of litigation that finds its way into this chapter each year, with mixed results. District courts have used the *Lemon* test to conclude that such prayers neither advance nor inhibit religion, while other courts have held that they impermissibly advance religious themes. A Michigan district court found in 1985 that a graduation invocation and benediction met all three parts of the *Lemon* test and the case was appealed to the Sixth Circuit Court of Appeals, which reversed the decision.[64] Both prayers in dispute, arising from two school districts, were Christian offerings that invoked the name of the Heavenly Father or Christ our Lord.

In analyzing the prayers, the appeals court looked at *Marsh v. Chambers*,[65] which held that the "history and tradition" of the country permitted "nonproselytizing" invocations of the sort used to open legislative and judicial sessions without offending the first amendment. Using the standard for ceremonial prayer developed in *Marsh*, the appeals court majority held that the commencement prayers were not, in fact, "civil" invocations or benedictions. The Christian prayers, the majority concluded, failed the test of neutrality established in *Marsh*. In dissent, one judge resisted the majority's analysis that the content of prayers should be subjected to scrutiny, arguing instead that the short prayers were insufficiently long or important enough to offend the first amendment.

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62. Smith v. Board of School Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala. 1987).

63. Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

64. Stein v. Plainwell Community Schools, 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

65. 463 U.S. 783 (1983).

State laws requiring the inoculation of children before commencing school attendance sometimes contain exemptions for religious sects that oppose inoculations on religious grounds. New York's law contains an exemption for members "of a recognized religious organization." The statute was challenged by parents who claimed that they had a personal religious objection and that the statute's "recognized" group requirement violated their first amendment rights and their right to equal protection under the fourteenth amendment.[66] A district court rejected state arguments regarding the plaintiff's standing and examined the constitutionality of the group requirement, finding that "no lengthy citation or analysis" was necessary to conclude that the policy violated the first amendment.

The court went on to hold that there was a less restrictive way for the state to assert its interest in having children inoculated, such as granting exemptions to those individuals with "religious" objections after the term was defined by state rules.[67] In looking at the plaintiffs in the case, however, the court found that the objections of one plaintiff plainly were "religious" and the objections of the other were not. The court found that the second plaintiff had gone to some length to disguise his views, including the purchase of membership in a mail order church, but that his views on inoculation were not "religiously inspired." Relief was granted to one of the plaintiffs and a discussion of fees and damages was put off until the parties had the opportunity to pursue the claim.

A Pennsylvania school board rejected a request from a subsidiary of the Campus Crusade for Christ to rent a high school auditorium for a weekend magic show that contained a fifteen-minute evangelical message. The board relied on its policy of not renting school facilities for religious services, instruction, or activities. The auditorium had, however, been rented to a wide variety of groups during nonschool hours. Plaintiffs in the case argued that the failure of the district to rent them the hall violated their first amendment speech and assembly rights and that the school had created an "open forum" by renting to other groups.[68] The district court agreed and granted an injunction to the plaintiffs, holding that the school clearly had established an open forum and that the defendant's claim that the establishment clause would be violated by the rental was unfounded, considering the time and day of the program.

A Texas district court reached the opposite conclusion in a case of a

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66. Sherr v. Northport-East Northport Union Free School Dist., 672 F. Supp. 81 (E.D.N.Y. 1987).

67. *See* Sherbert v. Varner, 374 U.S. 398 (1963) for a discussion of less restrictive alternatives in free exercise cases.

68. Gregoire v. Centennial School Dist., 674 F. Supp. 172 (E.D. Pa. 1987).

different sort that involved student prayer and evangelical recruiting, sometimes using bullhorns, in the corridors of a high school before and after school.[69] Plaintiffs in the case claimed they were "called by God" to preach and rejected off-campus locations for their services. The court held that in-school religious proselytizing violated the establishment clause, carrying the message that the school endorsed the content of the program. Using *Lemon*, the court held that both the second and third tests would not be met if the school permitted the activity to continue.

The Supreme Court ruled in 1985 that community education and shared time programs held in space leased from religious schools violated the establishment clause.[70] Following a denial of fees by the district court, based on a finding that the plaintiff's action was not brought under section 1983, or any other civil rights statute listed in section 1988 of the 1976 Civil Rights Attorney's Fees Act,[71] the case was back before the Sixth Circuit Court of Appeals.[72] The plaintiffs agreed that they filed their case seeking a declaratory judgment without making reference to section 1988, but argued that it would have been redundant to employ parallel citations. The appeals court could find no case "exactly like the present one," but concluded that other fee cases had made awards when the "substance" of the case involved a section 1983 claim, even if the court decided the case on other grounds.[73] In dissent, one judge argued that the plaintiffs were seeking to make an "after-the-fact conversion" of their action into a section 1983 claim and that the cases cast doubt on the majority's reasoning in the case. The district court now will establish reasonable fees.

First Amendment Freedom of Expression

Expression cases reflect the tension between individual student rights and the power of school personnel to determine the structure of the school environment. Cases in recent years have focused on attempts by students or others to have certain places within the school declared to be public or limited public forums, following the definitions established in *Perry Education Association v. Perry Local Educators' Association*.[74] The Supreme Court's ruling in *Cornelius v. NAACP Legal Defense and Education Fund*[75] that exclusion of groups from a public forum can

69. Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987).

70. School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1987). See The Yearbook of School Law 1986 at 94-5.

71. 42 U.S.C. §§ 1983, 1988.

72. Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids, 835 F.2d 627 (6th Cir. 1987).

73. See, e.g., Maher v. Gagne, 448 U.S. 122 (1980).

74. 460 U.S. 37 (1983).

75. 473 U.S. 788 (1985).

occur only with a showing of compelling state interest also is cited by plaintiffs seeking to establish or expand expression rights.

Grist for the further arguments in these cases was provided by Congress in 1984 with the passage of the Federal Equal Access Act.[76] The Act requires schools receiving federal funds and having a limited open forum to make space available to students for meetings without exercising content regulation. The Act was intended to permit student-led and -sponsored religious groups to meet during activity periods but its principal effect in litigation has been on the use of school facilities for antiwar and other secular activities.

All of these precedents were used by "peace activists" who sought to use school bulletin boards and guidance offices for literature distribution and to appear at school "career days" to respond to military recruiters. A district court granted summary judgment to the plaintiffs, concluding that a limited public forum had been created in the Atlanta public schools.[77] On appeal, the Eleventh Circuit Court of Appeals upheld the district court result, but on different grounds.[78] The appeals court found that the lower court had prematurely decided the forum issue, holding that factual questions on the issue remained.

The appeals court, however, held that the school's refusal would not pass muster even if the schools had created only a nonpublic forum. Citing *Cornelius*, the court observed that nonpublic forum controls were permissible only if the distinctions drawn were reasonable in light of the purpose of the event and were viewpoint neutral. The appeals court could find no reason for the exclusion under this test and upheld the injunction issued by the lower court on this more limited ground.

After several years of relative inactivity in appeals involving school newspapers, three cases were decided in 1987, each presenting an interesting fact situation. In the first, a Pennsylvania seventh-grade student who testified he was called "to lead people to the Lord" filed suit when school officials sought to limit his distribution of a religious newspaper.[79] The newspaper was produced in Illinois by a group known as "Student Action for Christ." The plaintiffs resisted attempts by the school to force them to distribute the paper on the sidewalk outside the school and litigation commenced when the student received in-school suspensions for persistently ignoring his principal's instructions to stop the distribution.

The district court rejected the plaintiffs' assertion that the corridors

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76. 20 U.S.C.A. § 4071 *et seq* (Supp. 1985).

77. Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986). *See* The Yearbook of School Law 1987 at 96.

78. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987).

79. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

of the school were a limited open forum, under the terms of the Equal Access Act. The court found that the purpose of the Act was to regulate "meetings" and that the gathering of students in hallways was not a meeting under the terms of the Act. The court did find, however, that the school had created a limited public forum during its end-of-the-day activity period. Student clubs met at that time for generally unsupervised activities. While it was not precisely the relief sought by the plaintiffs, the court concluded that the disputed paper could be distributed and discussed in the activity setting. Holding that it was reasonable for schools to exercise time and place restrictions on the distribution, the activity period represented a part of the day already established for student-initiated activities. On reaching this conclusion, the court argued that the 1984 Equal Access Act had the effect of overturning a 1983 Third Circuit decision which held that religious activities in activity periods were not permitted by the establishment clause.[80]

In the early 1970s, a series of federal courts of appeal decisions upheld the right of school principals to exercise prior restraint on the content of student newspapers, including those produced off campus, so long as reasonable standards were employed and an appeals process was present to contest unfavorable decisions. The Eighth Circuit Court of Appeals again confronted the question of prior restraint in a case originating in Fridley, Minnesota.[81] Students distributed an underground newspaper, *Tour de Farce*, and both sides then sought a summary judgment in district court after school officials asserted the school's written policy requiring prior review. The court granted a summary judgment upholding the policy and the plaintiffs appealed.

It was not alleged by the school that harm had come to any party as the result of *Tour de Farce*, and no student was punished, so the issue before the appeals court was solely the school's written policy involving prior review and restraint. The Eighth Circuit had previously ruled that prior restraint, in a case involving a school-sponsored newspaper, was not, *per se*, unconstitutional and the current court found it was bound by that decision.[82] The appeals court also concluded, by a 2-1 vote, that the specific written policy used by the system was not overbroad, except for a section that had been deleted by the district court.

Both the two-person majority and the dissenting judge focused on the standard in *Tinker v. Des Moines Independent Community School*

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80. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986). The case was vacated for lack of standing to appeal. *See* The Yearbook of School Law 1987 at 90-1.

81. Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987).

82. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987). *See* The Yearbook of School Law 1987 at 96-7.

District,[83] which holds that schools must be able to forecast disruption before a student's first amendment rights can be limited. The majority cautioned the defendants that criticism, "even in vigorous or abrasive terms," did not necessarily cause the level of disruption that would permit suppression of speech. They held, however, that the written policy developed by the district was adequate, while cautioning that the use of the policy would determine whether constitutional rights had been violated. The dissenting judge argued that the policy was overly vague and would inevitably lead to a denial of first amendment rights if it were applied.

Prior restraint also was the issue in a 1987 Washington State case when students received a letter of reprimand for distributing a paper on school grounds at a senior class barbecue.[84] The paper, *Bad Astra*, contained criticisms of teachers so severe that it was reported that several teachers found it "emotionally difficult" to continue teaching during the half day of classes that remained. The students were disciplined for failing to submit *Bad Astra* to the principal and for using pseudonyms to write the paper. Identities were easy to determine, however, because the mother of one of the students, who also was the head of the high school P.T.A., distributed copies to all faculty by placing them in teacher mailboxes.

The district court examined both the old policy on newspapers that was in force on the day of the occurrence and a new policy that was enacted later by the school board. Portions of the new policy were found to be overly vague. As to the *Bad Astra* distribution, the court held that prior restraint was justified to avoid disruption and to give students a chance to modify content to avoid damaging others. The old policy had an adequate appeals process and the court found it unnecessary to review some of the content criteria of the old policy since it had been replaced and since they were unrelated to the litigation at hand. In view of the cooperation by the plaintiffs in developing the new policy, the court invited the defendants to consider removing the disciplinary letters from the students' files.

A teacher who was dismissed as the advisor of the school newspaper filed suit alleging that the principal's action violated his own and his students' first amendment rights.[85] The teacher was dismissed after the paper ran an article critical of the federal Martin Luther King, Jr. holiday. While the advisor did not agree with the content of the article, he had assisted the student in improving the quality of the piece and allowed it to be published. The principal acted because she felt that the

83. 393 U.S. 503 (1969).
84. Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987).
85. Romano v. Harrington, 664 F. Supp. 675 (E.D.N.Y. 1987).

teacher should have been more sensitive to the impact the article might have on minority students in the school.

The case involved both contract rights and first amendment issues. The district court refused to see the teacher's work on the newspaper as a curriculum matter, finding that the teacher's first amendment rights had not been violated. But the court went on to hold that the teacher had third party standing to seek relief on behalf of students, whose first amendment rights were implicated by the firing. Students who were fearful that their advisor might be fired if they wrote a controversial piece would suffer a loss of their freedom of expression. The court refused to grant summary judgment on the contract question, holding that the record was not complete on the question of the teacher's possible loss of property rights or on the need for procedural protection in the teacher's dismissal from extracurricular assignments.

A satirical tee shirt that caricatured the principal and two other administrators received unsatisfactory reviews from those appearing on the shirt. The shirt showed the administrators in a state of intoxication, holding aloft a variety of alcoholic beverages. The creator of the shirt was suspended for two days and filed suit when administrators refused to allow him to remain in school when he arrived wearing one for morning classes.[86] Both sides in the case filed for injunctive relief.

The court's analysis focused on the message that was conveyed by the shirt, finding that the record indicated no intent to communicate a political message. The court did find, however, that the shirt falsely communicated the message that administrators drank excessively. This, the court reasoned, would interfere with their ability to serve as role models. The defendant's request for an injunction therefore was granted and the student's first amendment claims were dismissed.

The final case to be discussed is certain to be included in future presentations by school law experts as proof that very unusual issues can be the subject of free expression claims. The suit resulted when a school principal refused to let two students dressed in clothing of the opposite sex attend their junior-senior prom.[87] The students, who were brother and sister, claimed unsuccessfully that the school's dress code violated their first and fourteenth amendment equal protection rights. The equal protection argument was especially interesting, with the brother claiming that his high heels, earrings, stockings, dress, and fur cape were identical to those worn by female students who were allowed to attend the event. The court dismissed this and other claims, granting summary judgment to the defendants.

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86. Gano v. School Dist. No. 411 of Twin Falls, 674 F. Supp. 796 (D. Idaho 1987).
87. Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987).

SANCTIONS FOR STUDENT MISCONDUCT

Suspensions and Expulsions

Goss v. Lopez[88] requires school administrators to provide students with information about the offense they are alleged to have committed so that a student can tell his side of the story before being suspended. In cases where the suspension is greater than ten days in duration, more due process is required. Since the 1975 *Goss* decision, courts traditionally have declined to read the case as requiring elaborate due process, except where expulsion from school is the penalty. Not all short-term school suspensions have the same effect, however. A short-term suspension, for example, may occur immediately before an examination period, causing students to fail courses. The *Goss* court did not consider the questions of disproportionate suspension impact, though it was argued in several of the cases that follow.

An Illinois student who consumed a cocktail at a senior class outing was suspended for the remaining three days of the school year. He missed his final exams and failed three classes, resulting in his inability to graduate from high school. Another student who was suspended for the same offense also missed his exams but had sufficient accumulated credits to graduate. The court found that both students had received an adequate hearing before the school board.[89] The court refused to hold, however, that the "long-term effect" of the suspension for the student who failed made it the equivalent of an expulsion, thereby triggering additional due process requirements. On the plaintiff's equal protection claim, the court ruled that the differences between the treatment of the two students flowed from their different grade point averages, rather than a violation of the equal protection clause. Finally, the court observed that it was not the role of the federal courts to question the "wisdom or compassion" of a particular administrative decision.

A student who attended a school dance while intoxicated was expelled and appealed to an Alabama court.[90] He argued that an intoxicated friend who also was arrested by police at the dance was not expelled. The student claimed the failure of the school to assign similar penalties for the same offense violated the equal protection clause. The Alabama appeals court disagreed, holding that the school board had considered the strength of the evidence regarding the intoxication of the other student, finding the evidence less compelling than that confronting the plaintiff.

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88. 419 U.S. 365 (1975).

89. Lamb v. Panhandle Community Unit School Dist. No. 2, 826 F.2d 526 (7th Cir. 1987).

90. Carroll v. City of Dothan Bd. of Educ., 510 So. 2d 246 (Ala. Civ. App. 1987).

In an Arkansas case, the state supreme court heard an appeal from a school district that had expelled a student for "taking delivery" of drugs in a school restroom.[91] The pills were over-the-counter diet aids and all parties in the case knew at the time that the drugs were not prohibited substances. A lower court decision ordered the student readmitted to school and she graduated. In reviewing the case, the Arkansas high court noted that no laboratory analysis had ever been conducted to determine the content of the pills. Even if they were diet aids, the court concluded that an expulsion rule for bringing such pills to school could be established by the board.

A student who was suspended for the balance of a semester for selling marijuana in school filed suit in federal court, claiming that he had received inadequate notice of the charges and that his attorney had not been able to cross-examine the principal in his hearing before the school board.[92] The court found that the four opportunities afforded the student at various times to discuss the charges represented adequate notice. On the request to cross-examine, the court held that there was no such right in a student suspension proceeding.

Student field trips offer a fertile ground for misconduct cases that appear in this section. In one such case, a trip to Hawaii for a band competition led to a hotel room altercation between students and their principal. The principal found out that female students had been using an unoccupied room adjacent to their own and a boy was seen on the balcony next to the unoccupied room. The principal ordered the girls to pack for a return flight to Tennessee. Alcohol was then found in the refrigerator of the unoccupied room. This enraged the principal, who broke down the door to the bathroom where one of the girls was located and slapped the student. The four students were taken to the airport with standby tickets and inadequate money for meals. They spent twenty-four hours at the airport and eventually returned home twelve hours later.

A lawsuit resulted, with a district court granting the defendant's motion to dismiss all state law issues. On appeal, the Sixth Circuit Court of Appeals held that a search of the students' possessions was reasonable, using *T.L.O.* analysis.[93] But the search did not occur in school, causing the court to apply the seldom-used *in loco parentis* doctrine, after considering the nature of the field trip and the role of chaperones on such trips. The suspension of the plaintiff for seven days also was upheld. But the alleged assault, the appeals court held, was not appropriately dismissed by summary judgment. The need for the principal to

91. Springdale Bd. of Educ. v. Bowman, 740 S.W.2d 909 (Ark. 1987).
92. Newsome v. Batavia Local School Dist., 656 F. Supp. 147 (S.D. Ohio 1986).
93. Webb v. McCullough, 828 F.2d 1151 (6th Cir.

strike the student "was so minimal or nonexistent that the alleged blows were a brutal and inhumane abuse of . . . official power, literally shocking to the conscience."[94] The issue was remanded to the district court for further hearings.

A Pennsylvania student was suspended from school when he succeeded in entering the school's main computer from his home computer. The thirty-day suspension was overturned by a lower court on the ground that the school board's attorney served as prosecutor in the case and then advised the board on how to decide it when deliberating in closed session. The school district appealed.[95] In looking at the case, the state appeals court framed the issue in terms of the *Goss* decision and state cases, holding that the attorney's role was inappropriate but that the flawed use of the attorney did not represent a "purposeful" disregard of the student's rights. The case therefore was remanded to the school board with an order to change the attorney's role and to rehear the case.

A Florida student was "transferred" from his high school for a major infraction of school rules. The plaintiff was sent to a separate facility designed for students with behavior problems for a minimum of ten days. Florida law, however, requires parent notification and participation in suspension cases. The school district failed in its attempt to convince an appeals court that the transfer was not a suspension and the court ordered the suspension dismissed for failure to notify the parents.[96]

Juvenile proceedings and school suspension or expulsion proceedings sometimes become mixed, with the requirements of one system conflicting with the other. Such was the case in North Carolina, where a student had been suspended for the balance of the school year for physically assaulting another student. At the same time, the student was adjudged a delinquent by a juvenile court, and the judge required the student to be provided with "some type of public school situation." The school board appealed.[97] In resolving the conflict, the appeals court held that lawfully suspended or expelled students could not be ordered back to school in juvenile proceedings, unless the school consented to the student's readmittance. The court reached its decision reluctantly, expressing at some length its preference for some educational placement for juvenile offenders as an alternative to leaving them "free to roam at will."

Finally, in a most unusual case, a Pennsylvania appeals court heard an appeal from a student who admitted to possession of marijuana on a school field trip to an amusement park.[98] As required by state law,

94. *Id.* at 1159.
95. Pittsburgh Bd. of Pub. Educ. v. M.J.N., 524 A.2d 1385 (Pa. Commw. Ct. 1987).
96. W.A.N. v. School Bd. of Polk County, 504 So. 2d 529 (Fla. Dist. Ct. App. 1987).
97. *In re* Jackson, 352 S.E.2d 449 (N.C. Ct. App. 1987).
98. Keeler v. Everett Area School Dist., 533 A.2d 836 (Pa. Commw. Ct. 1987).

notice of the student's suspension was sent to the secretary of the school board. The plaintiff sued the principal who sent the letter for defamation of character and intentional infliction of emotional distress. It took only a few paragraphs for the court to dispose of the appeal, finding it had "no merit" and that defamation is not possible in cases where no false information is supplied and where the notice is required by law to be sent.

Corporal Punishment

Corporal punishment cases in recent years have consisted entirely of state litigation with no serious constitutional claims at issue. In contrast, two 1987 circuit courts of appeal decisions addressed major constitutional challenges. The Supreme Court's 1977 decision in *Ingraham v. Wright*[99] is generally remembered for its holdings that no hearing is required before the administration of corporal punishment, that corporal punishment is not a cruel and unusual punishment prohibited by the eighth amendment, and that excessive corporal punishment should be an issue addressed in state courts through criminal or civil action. *Ingraham* did not address squarely the question of whether excessive corporal punishment might violate a student's substantive due process rights. Two circuit courts of appeal decisions are in conflict on the question, one ruling that there could be a substantive due process violation[100] and one ruling the opposite.[101] Another circuit court also ruled that excessive punishment of a handicapped student could be a substantive due process violation.[102]

The Tenth Circuit Court of Appeals confronted the question of corporal punishment substantive due process in a case that originated in New Mexico.[103] The parents of a nine-year-old elementary school student went to federal court following two corporal punishment incidents. In the first, a teacher held the girl by her ankles while the principal struck her legs with a paddle that was split down the middle. The paddle left a two-inch scar on the child's leg. In the second episode, the child was held bent across a desk while her buttocks were paddled. A school nurse testified that the bruises were so severe that she would have called the police to report a case of child abuse, had the child come to school in that condition.

The district court granted summary judgment to the defendants,

99. 430 U.S. 651 (1977).
100. Hall v. Tauney, 621 F.2d 607 (4th Cir. 1980).
101. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).
102. Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).
103. Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

holding that they enjoyed qualified immunity for the beatings. The court of appeals reversed and ordered the district court to hear the case. The appeals court viewed *Ingraham* as requiring, "at some point," that excessive corporal punishment violates the pupils' substantive due process rights. The appeals court used a Supreme Court criminal search case[104] as justification to conclude that official conduct that "shocks the conscience" can violate substantive due process rights. The court went on to create three categories of corporal punishment—those that are reasonable and not actionable; those that exceed the common law standard without adequate state remedies, violating due process rights; and those that are shocking to the conscience that violate substantive due process rights. While the plaintiff's claims may "not survive the crucible of the trial," the chance to secure relief was ordered.

A qualified immunity defense raised by school officials was rejected in a case before the Fifth Circuit Court of Appeals.[105] The case presents another shocking fact situation, this one involving an eight-year-old student who was tied to a chair with a jump rope for a day and part of another. The student was freed for lunch but was not allowed to use the bathroom during her confinement. The teacher did not argue that the procedure was a punishment but instead that it was an "instructional technique." The appeals court held that *Ingraham* did not apply as cited by the defendants, since they had already claimed that the teacher's action was not a punishment. The court also added that the principal and teacher were not entitled to immunity, the only issue appealed in the case. The court held they should have known that tying a student to a chair for nearly two days would clearly deny the student's constitutional or statutory rights.

A Tennessee district court considered the use of a "time-out box" to confine students in a sixth-grade classroom.[106] The box was a refrigerator carton, with an open top and front, into which a desk had been placed. The student could see the teacher but not other students in the class. The student left the box to use the bathroom, eat lunch, and attend reading classes. No issues involving special education were present since the student had not been identified as handicapped. The student was in the box for six days, however, and his parents filed suit on a wide variety of procedural and substantive grounds.

The district court could find no support for the plaintiff's suggestions that *Ingraham* or *Goss* applied to the case, since there was no suspension or corporal punishment. In fact, the court found that the student could participate fully in the class and that this was preferable to disciplinary

104. Rochin v. California, 342 U.S. 165 (1952).
105. Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303 (5th Cir. 1987).
106. Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155 (E.D. Tenn. 1987).

exclusion. The court also refused to find that the eighth amendment had been violated, concluding that the only harm experienced by the student was that he could not see his classmates. "While prolonged, uninterrupted confinement to a 'timeout' area might give rise to a constitutional claim, plaintiff's punishment was not unduly harsh . . . ."[107] The court granted the defendants' motion for summary judgment.

DESEGREGATION

Court supervision of desegregation continued unabated in several jurisdictions, most notably in Denver, St. Louis, and Kansas City (Missouri). Elsewhere, however, long-standing cases appeared near termination. Arguments also continued in 1987 cases regarding the attainment of unitary status. That status ends district court supervision of local desegregation issues and returns control of the matter to the local school board. It proved difficult, however, for districts to win a declaration of unitary status from federal courts in 1987. On the other hand, new plaintiffs were rebuffed in several attempts to reopen cases in districts where unitary status had been declared.

Systemwide Remedies

Once a school district has been declared "unitary" with regard to school desegregation, the burden is on the plaintiffs to show that the school system has become resegregated through official action. In other words, the burden of proof is the same as that which is required in new cases. Three 1987 cases involved attempts by plaintiffs to reopen long-dormant cases by alleging new systemwide segregation. All three attempts met with failure.

Austin, Texas plaintiffs failed to convince a federal district court that a case closed four years ago should be reopened and failed to show that current school segregation was the result of purposeful action. The Fifth Circuit Court of Appeals affirmed the district court ruling in both areas.[108] The plaintiffs buttressed their case on a Tenth Circuit case[109] that held that even unitary districts could be subjected to continuing litigation, if the new action involved a previous injunction issued in the case. Following the Tenth Circuit reasoning, the burden was still on the defendants to show that no changes in the injunction were needed.

The Fourth Circuit, in the same year, reached an opposite con-

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107. *Id.* at 159.

108. United States v. Texas Educ. Agency, 671 F. Supp. 484 (W.D. Tex. 1987), *aff'd sub nom.*, United States v. Overton, 834 F.2d 1171 (5th Cir. 1987).

109. Dowell v. School Bd. of Okla. City, 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 426 (1986).

clusion[110] to that of the Tenth. In the case under discussion, the Fifth Circuit agreed with the Fourth. The Fifth Circuit observed that the problem with the Tenth Circuit approach was that it "denies meaning to unitariness by failing ever to end judicial superintendence of the schools."[111]

The plaintiffs in the Austin case were objecting to a plan by the system to end most elementary busing, with the effect that sixteen of sixty-five elementary schools would become racially identifiable. The Fifth Circuit held that the plan's adoption was based on such factors as long bus routes, overcrowding, and new state education requirements. Also at issue was the timing of the suit, which sought an injunction twelve days from the start of the school year. In affirming the lower court, the appeals court held that no discriminatory intent had been proven and that there was little likelihood that the plaintiffs would prevail if the injunction were granted.

An Arkansas district court reacted in 1985 to a case with facts more common to desegregation cases of twenty years earlier by ordering the development of a desegregation plan.[112] Plaintiffs in the case offered evidence that the school board election system discriminated against blacks, that racial slurs were commonplace in the schools, that blacks were denied the use of school facilities, and that black teachers were dismissed without regard to seniority when an all-black school was closed. Following the issuance of the order to develop a desegregation plan, the defendants appealed. The Eighth Circuit Court of Appeals dismissed the appeal as premature, holding that an order to develop a "legal plan" was not a reviewable injunction.[113]

Attempts to find new school segregation in Topeka, Kansas were rejected by a district court.[114] In finding that any current segregation, if it exists, was "not the result of past or present intentional segregative conduct" the court first conducted an exhaustive review of school practices. Included in the court's review were the minority composition of schools, transfer policies, new construction, boundary decisions, and other factors. Test scores of students and even a community attitude survey, asking questions about the public's perception of the racial identity of schools, were reviewed by the court. The court ultimately concluded that the plaintiffs were arguing for "judicial fine-tuning" in a

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110. Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 420 (1986). *See* The Yearbook of School Law 1987 at 110-2.

111. United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987).

112. Sherpell v. Humnoke School Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985). *See* The Yearbook of School Law 1986 at 112.

113. Sherpell v. Humnoke School Dist. No. 5, 814 F.2d 538 (8th Cir. 1987).

114. Brown v. Board of Educ. of Topeka, 671 F. Supp. 1290 (D. Kan. 1987).

system that all evidence suggested already was functioning effectively. The court declared the system unitary.

Cross-district Remedies

Cases in this section invariably are of long standing and involve several local jurisdictions, and sometimes states, in remedying past segregation. The issue of who must pay to remedy past discrimination is frequently litigated. These cases also require courts to determine proportionate responsibility for violations as a predecessor to assessing compliance obligation.

Litigation surrounding desegregation plans in St. Louis set a record of sorts with five published decisions from federal courts in 1987. A part of the plan to end the fifteen-year-old case involved adjustments to four vocational high schools. Capacity at the four schools is 6,700 students but only 1,700 were enrolled in 1986. The district court ordered the closing of two of the schools, in the face of the plummeting enrollment.[115] The district court also ordered changes in the vocational education component of the previously agreed upon desegregation plan. The district court left unchanged its previous order refusing to approve a four-year program at one of the four schools that earlier had been changed to a two-year program for juniors and seniors.

The district court's vocational education plan was reviewed by the Eighth Circuit Court of Appeals, which affirmed a 1986 district court slip opinion obligating the state to pay the total transportation costs for intradistrict transfers.[116] The appeals court also held that the lower court should hold a hearing on which of the vocational schools should be closed. The appeals court did so only after noting that the vocational schools still remain segregated and that the remand gave the parties a final chance to reach a voluntary agreement.

The Eighth Circuit court also reached a decision regarding class size and funding for special programs, issuing a second opinion to "restate" the first for the "convenience of the parties."[117] The participants apparently had been confused about the court's timetable for reaching a twenty-to-one student-teacher ratio, in nonintegrated elementary and middle schools, which the court intended to have in place by the start of the 1988-89 school year. The appeals court also modified lower court instructions regarding equipment transfers to the disputed vocational

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115. Liddell v. Board of Educ., St. Louis, 654 F. Supp. 334 (E.D. Mo. 1987). *See also* Liddell v. Board of Educ., St. Louis, 654 F. Supp. 345 (E.D. Mo. 1987) (stay in school closing granted; school closing does not impact negatively on handicapped children).

116. Liddell v. Board of Educ., St. Louis, 822 F.2d 1446 (8th Cir. 1987).

117. Liddell v. Board of Educ., St. Louis, 823 F.2d 1252 (8th Cir.1987), and 830 F.2d 823 (8th Cir. 1987).

school program.

Finally, in a decision with greater impact than the program adjustments made in 1987, the district court considered the question of needed capital improvements throughout the district.[118] In 1986 the Eighth Circuit had ordered the district to prepare a plan for capital improvements and to submit these to the voters in a bond referendum. In 1987 the district court received a $40 million list of capital improvements from the school district.

Both the district and appeals courts previously expressed, in the strongest language, that the present condition of school structures was so deplorable as to make any desegregation measure difficult. In the current case before the district court, the $40 million plan was rejected as totally inadequate and the court ordered the spending of almost $115 million, funded equally by both the district and the state.

A federal court on the opposite side of Missouri considered a long-range capital improvement plan that the court saw as "crucial" to the success of desegregation efforts in Kansas City.[119] The massive cost of the plan's magnet schools, involving 70% of the district's students, was already the subject of litigation in 1986. Likewise, the cost of capital improvements in the long-standing case has been high, with $37 million ordered in 1985 and another almost $67 million in 1986. In the matter before the court in 1987, the school district submitted a list of $194 million in capital improvements through the fall of 1990. The state defendants countered by proposing $61 million.

In weighing the competing capital project lists, the court literally became involved in the nuts and bolts of school planning, looking closely at what previous expenditures had accomplished and what remained to be done. The court also considered the ability of the district to pay for both capital and operating costs necessitated by desegregation, finding that the ability of the district to pay its share was severely limited. The district had been unable to secure a bond passage or a levy increase since 1969. Four referenda failed in 1986 and 1987. As a result, the court concluded, "its physical facilities have literally rotted."

Following an earlier Eighth Circuit opinion,[120] detailing steps to be taken if funds could not be extracted from voters, the lower court ordered the school district to issue $150 million in bonds by adding to the property tax and sales tax in Kansas City. A 1.5% surcharge on the income tax levied on anyone working or living in Kansas City was also added, so that those who lived in suburbs would help pay. The court

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118. Liddell v. Board of Educ., St. Louis, 674 F. Supp. 687 (E.D. Mo. 1987).
119. Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987).
120. Liddell v. Board of Educ., St. Louis, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 816 (1984).

also raised the city school tax levy from $2.05 per $100 of assessed valuation to $4.00 to provide the district with more operating revenue, noting that the new figure was still much less than any neighboring district. While the court order was drastic, the court found that the majority could no longer deny the constitutional rights of a "helpless minority."

The school board in Richmond, Virginia was unsuccessful in convincing a district court that the state had a further obligation to assist with desegregation,[121] and the Fourth Circuit affirmed.[122] In 1984 the school board became a plaintiff in the case. The board could not persuade the district court that the mostly black school district had not achieved unitary status. Therefore, the burden was on the board plaintiffs to show that the state had engaged in action that furthered segregation. While the appeals court agreed that additional state compensatory and remedial program funding would help the Richmond schools, the court concluded that the state had not played a role in creating the virtually all-black schools.

A suit brought by the Cincinnati school board against the federal Department of Health, Education, and Welfare in 1974, seeking emergency school aid to assist with desegregation, finally was settled by a consent decree in 1987.[123] The consent decree was entered after the district court had prepared a forty-page decision in the case. The agreement committed the federal government to a nearly $2.9 million payment that the court was prepared to order, with the decree differing from the court's decision only by stipulating that $200,000 of the settlement was to be for attorneys' fees.

A lawsuit by the state board of education against the Peoria, Illinois Board of Education regarding segregation in that community's gifted education program came to an end in 1987. The suit originally involved the federal government as a plaintiff, but a settlement was reached and the government withdrew. The state board, however, continued to press the suit. A district court held that the state did not have standing to pursue the case and, on a two-to-one vote, the Seventh Circuit upheld the lower court.[124] The majority concluded that only the state attorney general could bring such a suit, following a lengthy analysis of Illinois statutes. In dissent, one judge argued that neither state law nor federal rules suggested that the attorney general, with no obligation to monitor

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121. Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986). *See* The Yearbook of School Law 1987 at 110.

122. School Bd. of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).

123. Board of Educ., Cincinnati v. Department of H.E.W., 655 F. Supp. 1504 (S.D. Ohio 1987).

124. Board of Educ., Peoria v. Illinois State Bd. of Educ., 810 F.2d 707 (7th Cir. 1987).

education programs, should be expected to be the "watchdog" in this area.

A district court in Wisconsin heard a suit challenging the constitutionality of a state statute authorizing interdistrict transfer of pupils to promote integration.[125] A suburban Milwaukee minority student sought to attend a summer program in Milwaukee but was denied permission for reimbursement by his local board. A settlement in the case was reached but the plaintiffs sought to revive the suit for the purpose of challenging the constitutionality of the statute, which school officials used to permit white students to go from suburban areas to Milwaukee to further desegregation. This interesting reverse discrimination claim was rejected by the court because the plaintiffs had already reached a settlement. The court went on to hold, citing a Seventh Circuit case,[126] that minority students may be disadvantaged by components of integration plans, but that such claims must give way to advance court-approved integration.

The scope of the desegregation remedy in a sprawling, 700 square mile county school district involved in the Little Rock interdistrict desegregation case was before the district court four times in 1987. The three districts involved in the case reached an agreement with the state on a pupil transfer plan, on a timetable for a minority school administrator hiring plan, and on the use of tests to reduce the overrepresentation of blacks in special education classes. In the first of the decisions, the agreement was approved by the court.[127]

The Little Rock district and intervenors objected, in the second case, to a plan by the county district that left "white havens" to which it was alleged whites would move to avoid desegregated schools.[128] The court rejected the pleas that the plan should be overturned, observing that the district was so large that the alternative plan touted by the plaintiffs would mean that some children would face twenty-four mile one-way bus rides. The court expressed its sense that "the time for rancc and cram-down plans has passed," and that the county's voluntary plan should be given a chance to work. The court also approved expenditures for magnet schools, a deadline for student applications,[129] and a plan to call back laid-off minority teachers in disproportionate numbers if they

125. Willan v. Menomonee Falls School Bd., 658 F. Supp. 1416 (E.D. Wis. 1987).

126. Samayoa v. Chicago Bd. of Educ., 798 F.2d 1046 (7th Cir. 1986). *See* The Yearbook of School Law 1987 at 113.

127. Little Rock School Dist. v. Pulaski County Special School Dist., 659 F. Supp. 363 (E.D. Ark. 1987).

128. Little Rock School Dist. v. Pulaski County Special School Dist., 656 F. Supp. 504 (E.D. Ark. 1987).

129. Little Rock School Dist. v. Pulaski County Special School Dist., 663 F. Supp. 1554 (E.D. Ark. 1987).

were disproportionately laid off by the boundary changes ordered as part of the settlement.[130]

A parents' group in Ft. Wayne, Indiana filed suit alleging that the local school board had maintained a dual school district and that the state had not acted to dismantle the system.[131] The defendants counterpleaded, seeking to dismiss the suit. They failed in their attempt to have the plaintiffs' standing rejected and the court held that eleventh amendment immunity from federal claims did not apply to the state officials sued in their official capacity, with only prospective relief permitted.

Desegregation Plan Oversight

As is apparent in many of the cases already discussed, courts have played a central role in overseeing the implementation of desegregation plans. School systems, in several of the oversight cases that follow, eventually seek a declaration that their district has achieved unitary status. In 1987 two courts arrived at a middle ground between unitary and nonunitary, declaring that they were placing a desegregation case on "inactive status." This amounted to a sort of probationary unitary status and, given the fierce disputes over what a declaration of unitary status might mean, may be a course of action used by district courts that see progress in desegregation but do not wish to abandon control of a case totally.

The Fifth Circuit rejected a desegregation plan that had been approved by a district court for the Hattiesburg, Mississippi School District.[132] Secondary school integration had been accomplished to the satisfaction of all parties through a court order entered in 1971. The district had never been declared unitary, however, and minority group plaintiffs filed suit in 1984 challenging the existence of five virtually all-black elementary schools, out of eleven in the district. The district court accepted a school district plan that would have converted two of the all-black schools into integrated magnet facilities. One of the five schools was to be closed and the remaining two would remain all black. The effectiveness of the court-approved magnet system would have taken three or more years to measure.

The timetable and the existence of the two remaining segregated schools caused the Fifth Circuit court to conclude that the lower court had erred in its decision. The appeals court found an overreliance on the

130. Little Rock School Dist. v. Pulaski County Special School Dist., 663 F. Supp. 1557 (E.D. Ark. 1987).

131. Parents for Quality Educ. v. Ft. Wayne Community Schools, 662 F. Supp. 1475 (N.D. Ind. 1987).

132. United States v. Pittman, 622 F. Supp. 622 (S.D. Miss. 1985), *rev'd*, 808 F.2d 385 (5th Cir. 1987).

fear of white flight and a failure by the lower court to consider pairing and clustering to accompany the magnet schools. The court, in remanding the case, also was influenced by the district's small geographic area, making it possible to redraw attendance zones without creating long travel times for students.

District court supervision of desegregation in Denver continued in 1987. The court had asked the parties, in a 1985 opinion and order,[133] to try to reach a resolution of all outstanding issues so that the system could be declared unitary. The parties failed in the attempt and the court asked for separate plans, which the parties submitted even though the school district appealed the court's 1985 order. Before the district court in 1987, then, was the school system's plan for reaching unitary status and the plaintiffs' response.[134]

The court rejected a variety of suggestions made by the plaintiffs for changes in the system's plan, concluding that it was time to "relax" the degree of court control over Denver desegregation. The court held that it would continue to work toward the issuance of a final injunction, needed since the state constitution was modified in 1974 to preclude busing for desegregation except where a federal court order is present. Even though the court's 1985 order was still under appeal, the court ordered the parties to continue to work on remaining elements of the plan while allowing the defendants to proceed with the student and teacher assignments that they had presented to the court.

The court continued the task of fashioning an injunctive decree in the second Denver case published in 1987.[135] In a reversal of the approach taken by most school defendants, the Denver system continued to express a strong desire to have the court approve each detail of the plan for magnet schools, other student assignments, and facilities decisions. To the court, this cast doubt on the defendants "ability and willingness" to desegregate. The court ordered the system to use its own "expertise and resources" to reach decisions on these matters, under a series of general guidelines that warned of segregation and discrimination but contained no numerical or quantitative limits on the system's policies. The court's "interim decree" was held to supercede all previous orders and was to govern the district's activities until such time as a permanent injunction might be entered. The court thereby put Denver in a middle category of supervision, between absolute court control and unitary status.

The First Circuit considered a consolidated set of appeals from

133. Keyes v. School Dist. No. 1, 609 F. Supp. 1491 (D. Colo. 1985). *See* The Yearbook of School Law 1986 at 116.

134. Keyes v. School Dist. No. 1, 653 F. Supp. 1536 (D. Colo. 1987).

135. Keyes v. School Dist. No. 1, 670 F. Supp. 1513 (D. Colo. 1987).

three "final" Boston desegregation orders entered by the district court.[136] At issue was the general question of whether the district court was needlessly perpetuating its supervision of desegregation in Boston. The appeals were made by the city of Boston, contesting a "united facilities plan," by the school system, contesting the continuation of specified racial guidelines in pupil assignments, and by the teachers' union, appealing the requirements that 25% of the faculty and staff be black and 10% be from other minorities.

The appeals court began its analysis by concluding that the district had not achieved unitary status. It had, however, come so close that it remanded the case to the district court with a strong invitation that it reach the unitary finding. The appeals court concluded, on the question of student assignments, that unitary status had been achieved in that area and that further numerical control by the district court was unneeded. The appeals court used the Supreme Court's decision in *Pasadena City Board of Education v. Spangler*,[137] which held that it was possible to have unitariness in assignments without declaring the system unitary in all ways. On the teacher-hiring quota, the appeals court observed that the district had not objected to it and that the lower court's timetable for reaching the goal "struck a reasonable balance." On the facilities plan, the appeals court held that no controversy existed because the district had, in the interim, implemented the plan. The case was remanded to the district court and, with few matters left in dispute, it is possible that the litigation, after sixteen years, will soon come to an end.

The Bessemer, Alabama school district has operated under court order since 1971, as has Jefferson County in which Bessemer is located. In 1986 the city annexed two parcels of land that would add 200 and 700 students, respectively, to the city schools. The largest group of students were 94% black, and the addition of these students to the city schools would have an impact on the city's ability to continue school desegregation. The city sought to have the county continue to educate the group of 700 students, and the county objected, leading to a lawsuit that reached the Eleventh Circuit in 1987.[138] The district court held that the county must continue to educate the group while the county argued that the court was ordering interdistrict relief without evidence of an interdistrict violation, in contravention of the Supreme Court's holding in *Milliken v. Bradley*.[139] The appeals court held that the county had misread the situation, concluding that the relief sought was not inter-

136. Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).
137. 427 U.S. 424 (1976).
138. Brown v. Board of Educ., Bessemer, 808 F.2d 1445 (11th Cir. 1987).
139. 418 U.S. 717 (1974).

district in nature. The lower court's decision put no new burden on county schools and, because it was temporary in nature, was not an improper use of the court's injunctive powers.

Plaintiff intervenors sought to reopen active court supervision of school desegregation in Starkville, Mississippi.[140] The system had been submitting reports to the district court since 1972 and the plaintiffs now argued that the defendants had increased segregation through a student transfer policy, that the use of test scores to place children was discriminatory, and that staff hiring had discriminated on the basis of race. The court addressed each of these questions in detail, following a settlement by the parties on the transfer question, dismissing all claims after hearing from expert witnesses on each remaining issue. While the statistics on test scores and hiring were not favorable from the school system's perspective, the court concluded that there was lack of evidence that the differences between the races were due to discrimination.

140. Montgomery v. Starkville Mun. Separate School Dist., 665 F. Supp. 487 (N.D. Miss. 1987).